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UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF, ALICE H. HENRY

Plaintiff,

04-CV-8196 (NRB)

Defendant

PLAINTIFF, ALICE H. HENRY, COMPLAINT FOR
DISMISAL OF PLAINTIFF, ALICE H. HENRY, AND DEFENDANT
JAMES HENRY, K. CHAI, COMMERCIAL
BANK, NEW YORK, NY

Defendant,

Plaintiff,

Defendant, K. CHAI, COMMERCIAL BANK, NEW YORK, NY
and Plaintiff, ALICE HENRY, COMMERCIAL BANK, NEW YORK, NY
and Plaintiff, ALICE HENRY, COMMERCIAL BANK, NEW YORK, NY

Dated: December 11, 2007

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PRELIMINARY STATEMENT

Plaintiff worked as a Highway Repairer for the City of New York since 2001. Plaintiff brought numerous causes of action against defendants. Defendants partial motion for summary judgment is solely directed to plaintiff's ADA claims.

Plaintiff suffered repeated attacks of syncope while working for defendants, which caused him to faint. Defendants re-assigned plaintiff to asphalt, centering joints, and hardware fractions, and then to a Safety Position, and then determined plaintiff could not perform the essential functions of the job. Plaintiff submitted numerous medical certifications indicating that he could perform the duties of Highway Repairer. But defendants refused to accommodate plaintiff.

In opposition to defendants' motion for summary judgment, plaintiff established genuine issues of fact that plaintiff is an impairment that substantially limits major life activities, that he is qualified to perform the essential functions of the job of Highway Repairer, with or without accommodations, and that he was disabled, regarded as disabled, and has a record of a disability. Consequently, defendants' motion to dismiss is should be denied.

STATEMENT OF FACTS

Plaintiff, James Hines, began working for the New York City Department of Transportation as a full-time Assistant Highway Repairer in 1993 and was promoted to Highway Repairer in 2001. While working as a Highway Repairer, plaintiff suffered various episodes of syncope. On January 3, 2001, plaintiff suffered an attack of syncope while lifting a snow blower machine onto a Dot truck. He was admitted to Elmhurst Hospital for injuries he sustained when he fell on the ground (Ex. 3, pp. 3, 10, 11) and (d)1). On August 8, 2001, plaintiff collapsed and passed out while working in an 115 degree temperature. He was taken to St. John's Queen of the Medical Center (Ex. 3, pp. 10, 11) and (d)1). On November 9, 2002, plaintiff was diagnosed as having an enlarged heart (Ex. 3, 11). On January 19, 2003, while raking sand out of the back of the Dot truck, plaintiff fell a short distance and fell to the ground hitting his head and back. He was taken to Mt. Sinai Hospital of Queens by Dr. (d)1) and (d)2). On July 8, 2003, while plaintiff was filling potholes on an extremely high temperature, he felt a sharp pain in his chest and fell to the ground, hitting his left arm, back and head (Ex. 3, pp. 10, 11) and (d)3). On August 21, 2004, while raking a Dot truck with asphalt, plaintiff felt a sharp pain in his chest, fell to the ground and was taken to Coney Island Medical Center (Ex. 3, pp. 10, 11) and (d)1). On January 30, 2005, while sweeping and filling potholes all day, plaintiff felt light headed and fell to the ground, hitting his back and head. He was admitted to Long Island College Hospital (Ex. 3, pp. 10, 11) and (d)1).

As a result, plaintiff's physician, Dr. Es, diagnosed him with syncope (Ex. 3, pp. 3, 11, 13, 17). Dr. Es attributed this to plaintiff's increased heart rate, although he could not find any specific cause (Ex. 3, pp. 19, 21, 23, 27, 80). As a result of his syncope, plaintiff sought

workplace accommodations. Ann Williams, DRC Officer with the Department of Transportation, is the official who determines if an employee should get a reasonable accommodation (Ex. 2, p. 112). She testified as follows:

Q. In reality, as part of your duties and responsibilities, don't you determine if a person has disability under the Americans with Disabilities Act?

A. Sure, based on the condition diagnosed by the doctor.

Q. And did you conclude in Mr. Hines' case that he did have a medical condition under the ADA?

A. Sure. This is the reason why we provided him with function of his choice.

(Ex. 2, p. 136) Ann Williams knew that Mr. Hines suffered from kyphosis as far back as 1998 or 1999 (Ex. 2, p. 105).

As a result of his condition, defendant's accepted plaintiff to asphalt, cementing joint and hardware functions on October 18, 2005 because plaintiff indicated that he could no longer operate a jackhammer (Ex. 2, p. 5, Ex. 1, 7). Afterwards, plaintiff was offered a Safety Position in May 2006 (Ex. 2, pp. 17, 29, 32-34). Specifically, Ann Williams testified that a safety position can either be one where someone stands at the back of a truck, the back of the beginning of the curve or the exit of a site where they are performing work out on the flag or they are situated in a truck, they sit in a truck that blocks the entrance, and that's all you do.

(Ex. 2, p. 124). This safety work was described as "mildly physical" by an Administrative Law Judge (Ex. 8, p. 4).

Plaintiff has been out of work since January 2007. On March 9, 2007, defendants then created a list of 7 Tasks and Standards for the position of Highway Repairer (Ex. 19, 20).

These job functions were imprecise in that they did not state the amount of time an employee has to engage in these functions, the amount of weight involved, or the external conditions (Ex's 19, 20). Dr. Le testified that, in substance, he could not determine an exact amount of weight which plaintiff could safely lift because there are too many variables—the temperature at the time of the lifting, the number of hours engaged in lifting, the amount of weight involved, etc. He testified that "how much and how often it goes depends upon the circumstances" (Ex. 4, pp. 61-62), which circumstances were not spelled out on the defendant's list of tasks.

These 7 task and standards (Ex's 9, 19, 20) confirm that the position of Highway Reporter does not require repetitive, strenuous heavy labor. Task #1 involves vehicle operation, Task #2 involves equipment maintenance, Task #3 involves maintaining records. Task #4 involves taking proper safety precautions while performing a assigned duties, and Tasks #5, #6, and #7 require some physical labor, but no concurrent strenuous heavy physical labor (Ex. 19). Plaintiff is capable of performing these tasks. On March 21, 2007, plaintiff's co-worker did the task of incidental laboring related to street maintenance and waste bin collection (Ex. 19). In addition, next to the vague wording of Task #6 "General Labor as directed by the supervisor" (which did not specify the specific duties, duration, or conditions) plaintiff wrote, "For the health of my ability" (Ex. 19). However, plaintiff completed that form (Ex. 19) before he was placed on a new medication as directed by his doctor. Later he and his physician re-examined the form without any restrictions after he had been on medication (Ex. 20).

On June 8, 2007, after plaintiff had been medicated with metoprolol, plaintiff's physician represented that plaintiff could perform "all seven job assignments" (Ex. 19b; 20). Plaintiff corroborated this by letter dated June 25, 2007 (Ex. 11). Ann Williams simply did not accept

the veracity" of the information from the doctor's office (Ex. 2, p. 89), believing instead that the doctor's signature may have been falsified (Ex. 2, p. 103). Next, plaintiff furnished a letter from Dr. Lo (Ex. 21) attesting to his own signature on the previous document (Ex. 20) in which Dr. Lo stated plaintiff could perform the seven essential functions. This was solely to appease the strict standards being imposed by Anne Williams. This, too, was rejected (Ex. 22), thus preventing plaintiff from returning to work. Even a subsequent letter from Dr. Lo stating that "I have read the above polydipsia history. In my medical opinion, the above is well enough to return to work. He was also cleared by his internist, Dr. G." (Ex. 23) was rejected by Anne Williams (Ex. 24). To date, the DOL still refuses to permit plaintiff to return to work because of his disability record of a disability, and he cannot be compensated as disabled.

ARGUMENT

POINT I

DEFENDANTS ARE NOT ENTITLED TO THE "DRASTIC" PROVISIONAL REMEDY OF SUMMARY JUDGMENT AS A MATTER OF LAW WHERE THE EMPLOYER'S INTENT TO DISCRIMINATE IS AT ISSUE.

A motion for summary judgment succeeds only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c). In motions under Rule 56, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Mathiesen Electric Industrial Co., Inc. v. Zenith Radio Corporation*, 175 F.3d 734, 737 (1999), quoting *United States v. Debbell, Inc.*, 464 U.S. 694, 705 (1983).

The Second Circuit has warned against the "danger of robust use of summary judgment to clear trial dockets." *Gallagher v. DeLucia*, 199 F.3d 111, 115 (2d Cir. 1998) (it has noted that "summary judgment should be used sparingly when . . . state of mind and intent are in issue"). *DeLucia*, *Parlin Plastics Corp.*, 187 F.3d 67 (2d Cir. 1998) (see also, *Gilligan v. Prudential Residential Services*, 174 F.3d 129, 133 (2d Cir. 1999), upholding addendum court's finding by affidavit about placing summary judgment from employer when "or before, its intent to discriminate," *Rosen v. Thornburgh*, 923 F.328, 333 (2d Cir. 1991) ("in Title VII action, when a defendant's intent and state of mind are pivotal issues, summary judgment is ordinarily inappropriate")).

Despite defendants' invitation for the Court to do so, this Court cannot try issues of fact -- it can only determine whether there are issues to be tried. According to the Second Circuit, the Court

is no, to resolve issues of fact, its determination of whether the circumstances 'giv[e] rise to an inference' of discrimination must be a determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive. It is not the province of the summary judgment court itself to decide what inferences should be drawn.

Chambers v. TRW Copy Centers Corp., 431 F.3d 179, 181 (3d Cir. 1994) (hereinafter, *Galloway*);
Profford Residential Corp., 22 F.3d 1219, 1223 (2d Cir. 1994). Consequently, summary judgment is proper only "[w]hether no rational jury could find in favor of the nonmoving party because the evidence is supportive only slightly." *Galloway*, 181 F.3d at 179.

POINT II

PLAINTIFF'S SYNCOPE CONSTITUTES A DISABILITY UNDER THE ADA

To establish a prima facie case of discrimination under the ADA, plaintiff must demonstrate that:

- (1) the employer is subject to the ADA;
- (2) the plaintiff was disabled within the meaning of the ADA;
- (3) the plaintiff was otherwise qualified to perform the essential functions of the position without reasonable accommodation;
- (4) the plaintiff suffered an adverse employment action because of his disability.

Systech CFCU Inc. v. Mark Auerbach, Inc. (Case No. 3:04-cv-01161-JHE) (12/11/2007). Defendants claim that, as a matter of law, plaintiff fails to state a cause of discrimination because he is unable to prove elements (3) and (4). As to both elements, plaintiff raised no evidence regarding those elements.

V. Syncope Constitutes an Impairment Under the ADA

Under the ADA, an impairment is a

physiological disorder, condition, cosmetic disfigurement or anatomical loss affecting one or more of the major body systems: neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine, or [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

42 U.S.C. 12102(2), 29 CFR 1630.2(h). In the present matter, plaintiff suffered from a heart condition in 1996 and thereafter, on six occasions from 2005 through 2006, plaintiff suffered

from syncope causing him to faint on the job. Each time he fainted, he lost consciousness for a temporary duration. Although defendants contend that the medical record is "insufficient to establish that plaintiff suffers from a condition which affects one or more major body systems," Dr. Lo testified that, based on the medical record and his observations, plaintiff suffers from syncope which Dr. Lo attributed to plaintiff's increased heart rate (Ex. 5, pp. 69, 71, 73, 75, 80). Dr. Lo testified that there is not always an objective finding as to the cause of syncope, but that plaintiff was not faking the symptoms since he was actually injured during some of the episodes (Ex. 5, pp. 18, 23).

Syncope is a recognized "physiological disorder" in "condition" which affects the following major body systems: nervous, circulatory, musculoskeletal, and special sense organs. Fainting is an impairment which affects all major body systems because a person loses consciousness. It is equivalent to a grand mal epileptic seizure – a person suffering from syncope or epilepsy loses control of and thereby loses control over his bodily functions, including his neurological, musculoskeletal, and special sense organs. Accordingly, plaintiff's repeated episodes of fainting constitute a disorder or impairment under the ADA.

Defendants also contend that "Dr. Lo has never observed plaintiff faint, but this is fallacious. A physician need not witness a patient having cardiac failure, epilepsy, or syncope to determine that the impairment exists. In fact, the purpose of medical files, charts, and testing is to enable the physician to diagnose and treat an individual based on medical history, not on third party observations, which rarely occur. A diagnosis may occur notwithstanding the fact that no test revealed the cause³ of plaintiff's impairment. The ADA does not require that plaintiff or his physicians, understand the etiology of the impairment. Thus, in McCormak v. Long Island

Railroad Company, 03-CV-6597, 2006 WL 490032 at *4 (S.D.N.Y. Feb. 28, 2006), the court noted that “[w]hether the seizures are caused by the impairment of alcoholism or by some other factor is a medical question that need not be answered at the summary judgment phase.”

Since syncope is a recognizable physical impairment, and plaintiff and his physician have testified that plaintiff suffers from syncope, it is impossible for defendants to prove, as a matter of law, that syncope is not an impairment, or that plaintiff does not suffer from syncope. Therefore, plaintiff is entitled to a trial before a jury.

IV. Syncope Substantially Limits Plaintiff's Major Life Activities

Defendants' claim that plaintiff's impairment “does not rise to the level of disability within the meaning of the ADA because it did not substantially limit a major life activity.” Under the ADA, a major life activity means “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 42 U.S.C. § 12102(a). Stacy finding affects a person's consciousness – it affects numerous major life activities. Through a series of consciousness, syncope often causes a person's inability to walk, to speak, eat for oneself, and numerous other major life activities. There can be no serious dispute that numerous bodily functions are affected when a person loses consciousness.

Under the ADA

substantially limits (means) (i) unable to perform a major life activity that the average person in the general population can perform, or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. 1630(g)(i)-(ii). Since consciousness is a major life activity, and the predicate for numerous other major life activities (seeing, hearing, walking, caring for oneself, for instance), a loss of consciousness substantially limits plaintiff's ability to perform many major life activities.

Defendants argue that "plaintiff is limited only in his ability to perform strenuous physical activity, according to both his own testimony and the testimony of his physician."¹

Under the ADA

[T]he following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment, (ii) the duration or expected duration of the impairment, and (iii) the permanent or long-term impact, or the expected permanent or long-term impact of an resulting from the impairment.

29 C.F.R. 1630(g)(i)-(ii). In the present matter, even if the duration of each fainting episode is short, the permanence of the condition is some time or chronic since it has existed since 1997 (Ex. 1, pp. 9-10). Further, plaintiff's syncope – which occurred on a regular basis in the workplace – is a severe impairment because plaintiff lost control of nearly every bodily function during these episodes. (To a court, plaintiff's establish a question of fact – that his syncope substantially interferes with consciousness, which is an underlying life activity that covers many major life activities. Summary dismissal of this claim, as a matter of law, is not appropriate.

Although repetitive syncope – exercise under certain conditions – has triggered plaintiff's syncope, plaintiff does not contend that syncope prevents him from performing strenuous activity. The physical impairment of syncope limits plaintiff's major life activities related to consciousness – seeing, hearing, walking, and caring for oneself. Whether or not plaintiff can

¹ This is unlike *Fleuring v. Verizon New York, Inc.*, 03 CV 5639, 2006 WL 2705766 (S.D.N.Y. Sep. 22, 2006), where the plaintiff suffered from only one fainting incident.

perform strenuous activity, and the type of activity that he can perform, is only relevant to whether plaintiff can perform the essential functions of the job (discussed infra). Plaintiff's ability to perform strenuous work activities does not answer the inquiry of whether syncope substantially limits the major life activities which require consciousness. The term "substantially limits" only applies to the major life activities which, in this case, are those activities governed by consciousness. "Strenuous activity" is not a major life activity defined by the ADA. (See P.R. 1630H) – so whether plaintiff can perform strenuous activity is unrelated to the issue of fact at hand – whether syncope substantially limits any major life activities.

C. Plaintiff's Medical Condition Eliminates His Disability

Defendants also claim that plaintiff's syncope has been eliminated through medication and therefore, in the corrected state, plaintiff is no longer disabled. However, defendants have already conceded otherwise. Anne Williams, squarely testified that plaintiff is disabled. Specifically, she testified that:

Q. Is it fairly important, your duties and responsibilities, don't you, determine if a person has disability under the Americans with Disabilities Act?

A. Sure. That's one of the conditions I'm asked by the doctor.

Q. And did you conclude in Mr. Hines' case that he did have a medical condition under the ADA?

A. Sure. This is the reason why we provided him with the functions of his choice.

(Ex. 2 p. 136) Since facts adduced on a summary judgment motion cannot contradict deposition testimony, Reisner v. General Motors Corp., 671 F.2d 91, 92 (2d Cir. 1982); Schlesinger v. Sony

Corp. of America, 637 F.2d 41 (2d Cir. 1980), defendants cannot now contradict the testimony of its own witness by now claiming that plaintiff is not disabled under the ADA.

Defendants should also be equitably estopped from claiming that plaintiff's pursuit of medication and medical treatment (for an impairment that defendants claim does not exist) eliminates his disability. Equitable estoppel is "designed to ensure fairness in the relationship between parties." *Rates v. Long Island Rail Road Company*, 99 F.3d 507, 513 (5th Cir. 1995) (quoting *Konstantinidis v. Chen*, 626 F.2d 937 (1st Cir. 1980)). In the present case, plaintiff's physician presented numerous documents indicating that plaintiff could perform the essential functions of the job, and defendants repeatedly refused to negotiate plaintiff to the position of Highway Repairer, claiming that plaintiff could not perform the essential functions of the job. Defendants may not now claim the opposite—that plaintiff's impairment "does not cause any limitation." Defendants cannot blithely argue that plaintiff can perform the essential functions of Highway Repairer while defendants intentionally fired plaintiff from the same employee class since January 2007, depriving him of his wife and health insurance. The Court should not condone such inaction. Defendants are estopped, by their own actions, from claiming that plaintiff is not disabled, notwithstanding "the degree to which plaintiff's abilities are controlled, if at all, remains a disputed issue of fact." *McCormick v. The Long Island Rail Road Company*, 33 F.3d 659, 700 (2d Cir. 1994) (SAC N.Y. Feb. 18, 2006). This prevents summary judgment.

D. Plaintiff is Qualified to Perform the Duties as Highway Repairer

Defendants created a list of seven essential job functions for the position of Highway

Report on March 9, 2007 (Ex. 19, 20). These job functions were imprecise in that they did not state the amount of time an employee has to engage in these functions, the amount of weight involved, or the external conditions (Ex's 19, 20). Ultimare's physician indicated, in writing, that plaintiff can perform all these duties (Ex's 9, 10a, 19, 20, 21, 23), despite the vagueness of defendant's tasks and standards. However, defendants repeatedly received plaintiff's physician's representations that plaintiff could perform the essential functions of the job, in violation of the ADA.

The ADA contemplates an interactive process between the employer and the employee to determine the nature of a reasonable accommodation. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Number 915.002, October 17, 2002, question 1 ("A request for reasonable accommodation is the first step in an informed, interactive process between the individual and the employer."). An employer should obtain and review the impairment and its limitations with the employee and obtain records from the employee's physician. This is very important:

The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician or other health care professional to substantiate that s/he has an ADA disability and needs a reasonable accommodation. . . Documentation is important, but does not specify the existence of an ADA disability and explain the need for reasonable accommodation. Any medical examination conducted by the employer's health professional must be job related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.

Id. In the present case, there was no basis for defendants to conclude that plaintiff's medical

certifications were somehow "insufficient." If there were, defendants should have subjected plaintiff to a medical exam, which they did not do.

Defendants' tasks and standards (Ex's 9, 19, 20) confirm that the position of Highway Repairer does not require repetitive, strenuous, heavy labor. Task #1 involves vehicle operation, Task #2 involves equipment maintenance, Task #3 involves maintaining records, Task #7 involves taking proper safety precautions while performing assigned duties, and Tasks #4, #5, and #9 require some physical labor, but not constant, strenuous, heavy physical labor (Ex's 19, 20). On March 11, 2007, plaintiff received the list of medical tasks related to street maintenance and wrote "no" next to it (Ex. 19). In addition, next to the same wording of Task #6 "General Labor as directed by the commissioner" (which did not specify the type of duties, duration or conditions) plaintiff wrote, "to the best of my ability" (Ex. 19). However, plaintiff complained that review of defendants' vague standard, before plaintiff was placed on a no application to regulate his heartbeat. Later, he and his physician executed the form without any restriction, after he had been medicated (Ex. 20).

On June 8, 2007, after plaintiff had been medicated w/ dantepiprodol, plaintiff's physician represented that plaintiff could perform "all seven job assignments" (Ex. 10). Later, plaintiff communicated this by letter dated June 25, 2007 (Ex. 11). Ann Williams simply did not "accept the veracity" of the information from the doctor's office (Ex. 2, p. 89), believing instead that the doctor's signature may have been falsified (Ex. 2, p. 102). Next, plaintiff furnished a letter from Dr. Li (Ex. 3) attesting to his own signature on the previous document (Ex. 20) in which Dr. Li stated plaintiff could perform the seven essential functions. This was solely to appease the certified standards being imposed by Anne Williams. This, too, was rejected (Ex. 22), thus

preventing plaintiff from returning to work. Even a subsequent letter from Dr. Lo stating that, "I have read the above job descriptions. In my medical opinion, the above is well enough to return to work. He was also cleared by his neurologist" (Ex 23) was rejected by Anne Williams (Ex 51). Consequently, an issue of fact arises concerning whether or not plaintiff was qualified to perform the duties of Highway Repairer. Plaintiff's argument is further buttressed by the fact that he has not suffered an attack of syncope since he has been medicated with this dosage of metoclopramide. As the Second Circuit held in D'Amico v. City of New York, 139 F.3d 151, 154 (2d Cir. 1998), it then admitted, "where the issue to be decided is the likelihood that an event will occur, the fact that it did occur is perhaps the most probative evidence possible." Generally, where the condition has not recurred due to a physician's medication, that is the best evidence that it will not recur. Therefore, defendant has no basis to reject the certification of plaintiff's physician. Next, defendant, who made these medical representations from plaintiff, repeatedly rejected the unopposed numerous medical certifications that plaintiff could return to work. Defendants never sought a medical examination of plaintiff, as contemplated by the ADA. Under the circumstances, defendant cannot prove, as a matter of law, that plaintiff is unable to perform the essential functions of the job, especially since "the court must resolve all ambiguities and draw all inferences against the moving party." *Langley Retirement Living Pub. Co., Inc. v. EEOC*, 580 F.3d 101 (2009).

Defendants appear to claim that the plaintiff's syncope would pose a "direct threat" to himself or others under the ADA. The term "direct threat" means a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). This defense requires an "individualized assessment of the employee's present ability

to safely perform the essential functions of the job . . . based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r).

According to the Second Circuit, "[w]hen conducting such an 'individualized assessment,' the factors to be considered include '(1) [t]he duration of the risk, (2) [t]he nature and severity of the potential harm, (3) [t]he likelihood that the potential harm will occur, and (4) [t]he magnitude of the potential harm."²⁸ *Systech*, 410 F.3d at 101, 130 F.3d at 906 (2006). Further, this defense is "an affirmative defense to be proven by the defendant" *id.*, citing, *Lovejoy Wilbey v. N.O.R.O. Motor Fuel, Inc.*, 264 F.3d 293, 299 (A.D. Cir. 2001). "Since defendant's burden is that of proving this 'individualized assessment,' it cannot be evaded as a matter of law, but plaintiff cannot perform the essential function of the job due to a risk to the health and safety of himself and others, especially when plaintiff and his physician have represented that plaintiff could perform the essential functions of the job and defendant submitted no evidence to the contrary."

More specifically, "[a]n employer . . . is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e. high probability, of substantial harm, a speculative or remote risk is insufficient." *Lovejoy Wilbey v. N.O.R.O. Motor Fuel, Inc.*, 264 F.3d 293, 299 (A.D.Cir. 2001), quoting, *Hanbury-Clarker Township of Floyd*, 168 F.3d 426, 432 (6th Cir. 1999), quoting, 29 C.F.R. § 1630.2(r). In addition, "[t]he legislative history of the ADA also supports the premise that "[t]he plaintiff is not required to prove that he or she poses no risk."²⁹ *Id.*, citing, H.R. Rep. No. 101-485, pt. 3 at 46 (1990), reprinted in 1990 U.S.C.C.A.N.

115, 460. Consequently, an issue of fact remains as to whether plaintiff, after being medicated and certified ready to return to work by his physician, posed a risk to himself or others which prevented him from performing the essential functions of Highway Repairer.

Defendants did not provide sufficient information for any physician to effectively assess this risk based on the job specifications. Although Dr. Lo noted that plaintiff can return to work, he testified that the job duties were too vague to fully assess. Dr. Lo testified that, in substance, he could not determine an exact amount of weight which plaintiff could safely lift because there are too many variables – the temperature at the time of the lifting, the number of hours employed in lifting the same amount, weight involved, etc. He stated that "how much and how is treated just depends upon the circumstances." (Ex. 1, pp. 161-162). No physician can reasonably determine what an employee can or cannot perform with each individual parameter. Any person can be able to lift one hundred pounds in conditions of constant strenuous activity, in extreme weather, given the vagueness of the defendant's job functions. Plaintiff and his physician repeated representations that plaintiff can perform the essential functions of the job, and the fact that defendants had no contrary evidence, and never subjected plaintiff to an examination by one of defendants' physicians, plaintiff establishes an issue of fact regarding whether he could return to work to perform the essential functions of the position of Highway Repairer.

I. Plaintiff Can Perform the Essential Duties of Highway Repairer with Reasonable Workplace Accommodations

To the extent that plaintiff may need reasonable workplace accommodations, the record establishes that plaintiff can temporarily occupy a Highway Repairer Safety Position and/or asphalt, cementing joints, and hardware, if and when necessary. According to Anne Williams:

The safety position can either be one where someone stands at the back of a truck, the back of the beginning of the entrance or the exit of a site where they are performing work with a flag or they sometimes sit in a truck, they sit in a truck that blocks the entrance, and that's all you do.

(Ex. 2, p. 124). During anticipated periods of extreme weather, where plaintiff would otherwise be required to census by hand, heavy items, residents could temporarily assign plaintiff to the safety function. This position is an essential function of a Highway Repairer, especially since these duties must be performed by a Highway Repairer anyway, and plaintiff has previously performed this function. According to an Administrative Law Judge, plaintiff "worked for the [p]rayer of eight months on limited duty" and "nearly physical 'water' work" (Ex. 3, p. 4). At worst, plaintiff is capable of performing the essential functions of the position of Highway Repairer with a temporary accommodation by safety functions of Highway Repairer. As set forth in D'Amico v. City of New York, 132 F.3d 115, 181 (2d Cir. 1998) (citations omitted):

[I]t is enough for the plaintiff to prove the existence of a plausibly accommodated, he says, at which finally do not clearly exceed his abilities. Once the plaintiff has done this, he has made out a prima facie showing that a reasonable accommodation is available, and the rest of the persuasion falls on the defendant.

In D'Amico, plaintiff requested no accommodation, but in the present case, plaintiff supervises temporary accommodation to perform other Highway Repairer duties (Barley Bumfairs and/or asphalt, cementing joints and shoulders) on the few occasions where plaintiff would be required to perform repetitive strenuous activities on days of extreme weather, if necessary. At other times - and perhaps at all times, given his current medication - plaintiff is capable of performing the other essential functions of his job, notwithstanding defendant's vague profile of applicable job functions. Whether or not temporary safety functions or asphalt, cementing joints and

hardware functions of a Highway Repairer are a "reasonable accommodation" for a Highway Repairer, if not self-evident by defendants own admissions and accommodations, is a question of fact to be determined by a jury under the ADA. It is not a fact to be tried by a Court on summary judgment.¹

¹ Defendants have not argued, nor can they, that this type of accommodation, for the City of New York, would cause an undue hardship. 42 U.S.C. § 12112(b)(3)(A).

POINT III

EVIDENCE PLAINIFF IS NOT DISABLED; HE WAS REGARDED AS DISABLED AND HAS A RECORD OF A DISABILITY, WHICH MAKES HIM A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE ADA

A. Defendants Regarded Plaintiff as Disabled

Under 42 U.S.C. Section 12102(c), a plaintiff is a qualified individual with a disability if "he is regarded as disabled or has a record of a disability."¹ According to the Second Circuit:

A plaintiff cannot state a claim under the "regarded as" prong of the ADA . . . simply by alleging that the employer believed the plaintiff had a physical condition, such as height, weight, or hair color, rendering the plaintiff disabled. Rather, the plaintiff must allege that the employer believed, however erroneously, that the plaintiff suffered from an "impairment" that, if it truly existed, would be covered under the statute and that the employer discriminated against the plaintiff on that basis.

Heyman v. Queens Village Committee for Mental Health for Juvenile Community Adolescent Program, Inc., 198 F.3d 68, 73 (2d Cir. 1999), quoting *Frances v. City of Meriden*, 159 F.3d 73 785, 76, 77 (1997) (see also *Sutton v. United Airlines, Inc.*, 522 U.S. 471, 489 (1997)). This occurs where an employer believes "either that one has a substantially limiting impairment, but one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton v. United Airlines, Inc.*, 522 U.S. 471, 489 (1997).

In Heyman, the Second Circuit remanded a case where a memorandum from the employer

¹ Defendants in the Memorandum, *Low v. Support of their Summary Judgment Motion*, have furnished a statement that "Plaintiff does not complain that he was discriminated against because of either having a record of an impairment or being regarded as having an impairment" (Defendant's Memorandum of Law, p. 6, fn. 2). Plaintiff does, however, rely on these definitions of disability as referenced in the ADA and explicitly contained in the complaint, and the facts and record fully set forth in this defense. If deemed necessary by the Court, plaintiff can amend his complaint to explicitly state that he was discriminated against because he is regarded as disabled and has a record of a disability.

noted the "level of time and commitment" required of plaintiff, who had presented evidence of a "sterling attendance record" who worked "longer hours than required." *Id.* The Court held that "a reasonable jury could conclude that the concern expressed by Johnson was engendered by a fear that Heyman's lymphoma would render him unable to complete his assigned tasks." *Id.*

In the present case, it is undisputed that defendants refused to reinstate plaintiff to the position of Highway Reporter because they believe that his condition disqualifies him from performing the tasks of the position. Specifically, defendants re-assigned plaintiff to asphalt, sealing, joints, and hardware functions on October 18, 2008 (Ex. 7), to a Safety Position on May 2009 (Ex. 7, pp. 2, 4, 29, 31, 35), and prevented plaintiff from working at all after January 2007. When defendants created *Tasks and Standards* in March 2007, plaintiff's one physician indicated that plaintiff could perform these duties in June 2007 (Ex. 109, 11, 10), but defendants still refused to reinstate plaintiff. Consequently, defendants perceived – on numerous occasions – that plaintiff's impairment substantially limited his major life activities relating to consciousness, performing manual tasks, and/or working in a broad range of jobs. Similarly to Heyman, defendants' actions demonstrate that they regard plaintiff as "unable to complete his assigned tasks," even if he were not disabled.

The instant matter is similar to *Russo v. Super Food Services of Albany, LLC*, 488 F. Supp.2d 733, 756 (N.D.N.Y. 2007), where the plaintiff had epilepsy and the defendant "regarded plaintiff as unable to work in any job requiring the operation of trucks, forklifts, or any other company vehicle." The Court held that "positions requiring the operation of all vehicles and heavy equipment constitutes a class of jobs. Thus, plaintiff has shown that [defendant] regarded his epilepsy as a substantial limitation on his ability to work." *Id.* Similarly, defendants

facile conclusions that plaintiff was unable to perform the position of Highway Repairer, a Civil Service title that encompasses a broad range of jobs, demonstrates an issue of fact that defendants perceived plaintiff to be disabled.

14 Plaintiff is Disabled Because He has a Record of a Disability

"Even where an individual does not have a disability at the time of his employer's alleged discriminatory action, he may be considered disabled under the ADA if he 'has a record of a disability.'" *McCormick v. The Long Island Rail Road Company*, 313 F.3d 937, 940 (2d Cir. 2003) (citing *142d N.Y. L.J. 98* (2003), citing, 42 U.S.C. § 12107(a)(4)). *Schuel Board of Nassau County v. Arnett*, 380 U.S. 293, 314 (1987). Congress enacted this provision "to protect individuals from discrimination due to medical history." *Id.*, citing, 293 U.R.C. 13 (1981), Appendix 13(b)(2)(c). In the present case, defendants were aware of plaintiff's record of a disability since 1998 or 1999 (Ex. 2, p. 10). Specifically, plaintiff had a record of an open fracture on January 5, 2001 (Ex. 13 (b)(2)(b)) and (dm. Annex 3, 2001 (Ex. 13(b)(2)(b) and (c)), January 29, 2001 (Ex. 13(b)(2)(b) and (dm.)) July 8, 2001 (Ex. 13(b)(2)(b) and (d)), August 11, 2001 (Ex. 13(b)(2)(b) and (dm.)) and on January 26, 2006 (Ex. 13(b)(2)(b) and (c)). Notwithstanding the repeated representations from plaintiff (1) and his physician that plaintiff could return to work due to a medical condition that existed before her injury, defendants rejected plaintiff's medical certification without any basis. The person who rejected plaintiff's medical evidence was aware of plaintiff's record of a disability since 1998 or 1999 and testified that she rejected the veracity of the medical documentation. Consequently, another issue of fact arises - whether defendants refused plaintiff's return to work based on the record of plaintiff's disability. This also prevents

summary judgment.

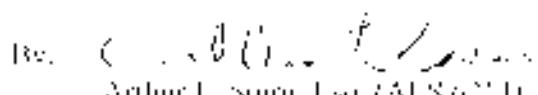
CONCLUSION

For the foregoing reasons, plaintiff requests that this Court deny defendant's motion for summary judgment, in its entirety and grant such other and further relief as the Court deems just and equitable.

Dated: December 11, 2007
Mineola, NY

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on December 11, 2007, I served the enclosed:

Brief on Behalf of Plaintiff James Hines in Opposition to Defendants' Motion for Summary Judgment

by ECF and by regular mail to

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John P. O'Connor
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